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BRIEF FOR PETITIONER

Supreme Court of the United States

OCTOBER TERM, 1937

No. 42

JAMES D. SMYTH, EXECUTOR OF THE ESTATE OF JAMES J. RANSOM, DECEASED, PETITIONER,

vs.

THE UNITED STATES.

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OPINION BELOW

The opinion of the Court of Claims was written by Judge Littleton and filed May 3, 1937. It appears at page 19 of the record, and will be reported in volume 85 of the Court of Claims Report, not yet published.

JURISDICTION

The jurisdiction of this Court is invoked under Paragraph (b) of Section 3 of the Act of February 13, 1925, c. 229 (43 Stat. 939, 28 U.S.CA., Sec. 288). A petition for a writ of certiorari to the Court of Claims was filed in this Court on May 7, 1937, and granted on June 1, 1937.

STATEMENT OF THE CASE, INCLUDING CHRONOLOGICAL STATEMENT OF DOCUMENTS, STATUTES, PROCLAMATIONS AND CIRCULARS INVOLVED

Petitioner is the owner and holder for value of a United States First Liberty Loan Bond the material parts of which read as follows (Rec. 5):

1932-1947 6670.

Act Approved April 24, 1917.

LIBERTY LOAN OF 1917.

THE UNITED STATES OF AMERICA

For Value Received Promises to pay to the Bearer the sum of
Ten Thousand Dollars

on the 15th day of June, 1947, with interest at the rate of three and one-half per centum per annum payable semi-annually on December 15 and June 15 in each year until the principal hereof shall be payable, upon presentation and surrender of the interest coupons hereto attached as they severally mature. **The principal and interest of this bond shall be payable in United States gold coin of the present standard of value,** and shall be exempt, both as to principal and interest, from all taxation, except estate or inheritance taxes, imposed by authority of the United States, or its possessions, or by any State or local taxing authority. . . . . All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, on any semi-annual interest payment date or dates, at the face value thereof and interest accrued at the date of redemption, and notice published at least three months prior to the redemption date, and published thereafter from time to time during said three months period as the Secretary of the Treasury shall direct. If in any case less than all of the bonds of said series are to be redeemed, the bonds to be redeemed will be determined by lot by such method as may be prescribed by the Secretary of the Treasury. From the date of redemption designated in any such notice interest on the

bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void. . . .

6670.

Washington, D. C., June 15, 1917.

W. G. McAdoo,
Secretary of the Treasury.

Recorded —— Examined ——.

Houston B. Teehee,
Register of the Treasury."

The interest coupon attached to petitioner's bond, payable December 15, 1935, reads as follows (R. 9):

"The United States of America

Will pay to bearer One Hundred and Seventy-Five Dollars ($175.00) for six months' interest due on the fifteenth day of Dec., 1935, on $10,000 3½ per cent bond of Liberty Loan of 1917.

Houston B. Teehee,
6670. *Register of the Treasury.*"

The relevant portion of Treasury Department Circular Number 78, under which petitioner's bond was issued, reads (R. 7):

1917

Department Circular No. 78.

"Treasury Department,
Office of the Secretary,
Washington, May 14, 1917.

Loans and Currency.

The Secretary of the Treasury invites subscriptions at par and accrued interest from the people of the United States of America for $2,000,000,000 of the 15/30 Year 3½ Per Cent Gold Bonds of an issue authorized by Act of Congress approved April 24, 1917. * * * * * * The bonds will be dated June 15, 1917, and will bear interest at the rate of 3½ per centum per annum from that date, payable semi-annually on December 15 and June 15. The bonds will mature June 15, 1947, but the issue may be redeemed on or after June 15, 1932, in whole or in part, at par and accrued interest, on three months published notice, on any interest day; in case of partial redemption the bonds to be redeemed to be determined by lot by such method as may be pre-

scribed by the Secretary of the Treasury. **The principal and interest of the bonds will be payable in United States gold coin of the present standard of value,** a[nd] the bonds will be exempt, both as to principal and interest, from all taxation, except estate or inheritance taxes, imp[o]sed by authority of the United States or its possessions, or by any State or local taxing authorities. * * *

W. G. McAdoo,
Secretary of the Treasury."

First Liberty Loan Bonds were issued under the Act of April 24, 1917 (Ch. 4, sec. 1, 40 Stat. 35), the pertinent provisions of which read as follows:

"The Secretary of the Treasury, with the approval of the President, is hereby authorized to borrow, from time to time, on the credit of the United States for the purposes of this Act, and to meet expenditures authorized for the national security and defense and other public purposes authorized by law not exceeding in the aggregate $5,000,000,000, exclusive of the sums authorized by section four of this Act, and to issue therefor bonds of the United States.

"The bonds *herein authorized shall be in such form* and subject to such terms and conditions of issue, conversion, redemption, maturities, payment, and rate and time of payment of interest, not exceeding three and one-half per centum *per annum*, as the Secretary of the Treasury may prescribe. **The principal and interest thereof shall be payable in United States gold coin of the present standard of value** *and shall be exempt*, both as to principal and interest, from all taxation, except estate or inheritance taxes, imposed by authority of the United States, *or its possessions*, or by any State or local taxing authority; but such bonds shall not bear the circulation privilege."

At the time of passage of the Act of April 24, 1917, and at the time the first Liberty Loan Bonds were issued, there was in effect the Act of March 14, 1900 (31 Stat. at L. 45, c. 41, § 1), defining the gold content of the dollar, and reading as follows:

"The dollar consisting of twenty-five and eight-tenths grains of gold nine-tenths fine shall be the standard unit of value, and all forms of money issued or coined by the United States shall be maintained at a parity of value

with this standard, and it shall be the duty of the Secretary of the Treasury to maintain such parity."

Under the authority of the Emergency Banking Act, passed on March 9, 1933, the President on April 5, 1933, issued Executive Order No. 6102, prohibiting the hoarding of gold, and requiring all persons to deliver all gold coin, gold bullion, and gold certificates owned or acquired by them to the Government, and accept legal tender currency therefor.

On May 12, 1933, Congress passed, and the President approved, the Agricultural Adjustment Act of May 12, 1933, authorizing the President, among other things, to reduce the gold content of the dollar.

On June 5, 1933, the Congress of the United States adopted a Joint Resolution (48 Stat. at L. 113, c. 48, U. S. C., Title 31, § 463), which reads as follows:

> (a) Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.
>
> (b) As used in this section, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve Banks and national banking associations."

On August 28, 1933, the President promulgated Executive Order No. 6260, requiring every person owning gold coin, gold bullion, or gold certificates to make a return to the Secretary of the Treasury, and prohibiting the acquisition of any such

gold without license and the holding of any such gold without license after thirty days from the date of the order, under penalty of fine and imprisonment.

On January 30, 1934, the Gold Reserve Act of 1934 (Act of January 30, 1934, 48 Stat. at L. 340, c. 6) became law. Section 5 of such Act reads:

> "**No gold shall hereafter be coined, and no gold coin shall hereafter be paid out or delivered by the United States:** Provided, however, That coinage may continue to be executed by the mints of the United States for foreign countries in accordance with the Act of January 29, 1874 (U. S. C. Title 31, Sec. 367). All gold coin of the United States shall be withdrawn from circulation, and, together with all other gold owned by the United States, shall be formed into bars of such weights and degrees of fineness as the Secretary of the Treasury may direct."

On January 31, 1934, the President issued a Proclamation (48 Stat. at L. Part 2, page 1730), the relevant provisions of which are:

> "Now, therefore, be it known that I, Franklin D. Roosevelt, President of the United States, by virtue of the authority vested in me by section 43, title III of said act of May 12, 1933, as amended, and by virtue of all other authority vested in me, do hereby proclaim, order, direct, declare, and fix the weight of the gold dollar to be fifteen and five twenty-firsts grains, nine-tenths fine, from and after the date and hour of this proclamation. The weight of the silver dollar is not altered or affected in any manner by reason of this proclamation."

On February 18, 1935, this Court decided the case of John M. Perry v. The United States, in which it held that the Joint Resolution of June 5, 1933, insofar as it attempted to override the obligation created by the Fourth Liberty Loan Bond is involved, went beyond the congressional power, but that the plaintiff in that case had failed to prove any damages.

On March 14, 1935, the Secretary of the Treasury issued a purported notice of call for redemption of the petitioner's bond. This notice was later sent forth in Treasury Department Circular Number 535, the pertinent part of which reads as follows (R. 9):

"REDEMPTION OF FIRST LIBERTY LOAN BONDS

1935

Department Circular No. 535.

TREASURY DEPARTMENT,
Office of the Secretary,
Washington, April 22, 1935.

Public Debt Service.

To Holders of First Liberty Loan Bonds of 1932-47, and Others Concerned:

I. Notice of Call for Redemption Before Maturity.

On March 14, 1935, the following public notice of call for redemption was given:

To Holders of First Liberty Loan Bonds of 1932-47, and Others Concerned:

Public notice is hereby given:

1. All outstanding First Liberty Loan Bonds of 1932-47 are hereby called for redemption on June 15, 1935. The various issues of First Liberty Loan bonds (all of which are included in this call) are as follows:

First Liberty Loan 3½ percent bonds of 1932-47 (First 3½'s) dated June 15, 1917;

First Liberty Loan Converted 4 percent bonds of 1932-47 (First 4's), dated November 15, 1917;

First Liberty Loan Converted 4¼ percent bonds of 1932-47 (First 4¼'s), dated May 9, 1918; and

First Liberty Loan Second Converted 4¼ percent bonds of 1932-47 (First-Second 4¼'s) dated October 24, 1918.

2. Interest on all such outstanding First Liberty Loan bonds will cease on said redemption date, June 15, 1935.

HENRY MORGENTHAU, JR.,
Secretary of the Treasury.

Treasury Department, Washington, March 14, 1935."

On August 27, 1935, Congress adopted a Joint Resolution withdrawing the consent of the United States to the assertion against it of any right, privilege or power "upon any gold-clause securities of the United States, or for interest thereon." Since this action was taken after the decision of this Court that the Government's obligation to pay gold was valid, this Joint Resolution is clearly a reaffirmation of the Government's

refusal to pay gold, and of its intention to redeem the called bonds in currency only. However, the Resolution expressly provides that the section shall not apply "to any proceeding referred to in this section in which no claim is made for payment or credit in an amount in excess of the face or nominal value in dollars of the securities, coins or currencies of the United States involved in such proceeding." Since this and similar suits only claim the face or nominal value in dollars of the coupon sued upon, the Resolution does not apply in any way to this kind of a suit.

Petitioner's bond was presented for payment on December 28, 1935, and payment demanded in gold coin in accordance with its terms. (R. 17). The respondent refused to pay gold on the ground that the Treasury was forbidden to pay out gold; and refused to redeem the bond except in legal tender currency. Thereupon, petitioner presented the interest coupon due December 15, 1935, on which this suit is brought, and demanded payment either in gold coin or in legal tender currency. Payment was refused on the ground that interest *had ceased to run on* June 15, 1935.

ARGUMENT

INTRODUCTION AND SUMMARY

The question involved in this case is whether interest ceased on a First Liberty Loan Bond on June 15, 1935, because of the Secretary of the Treasury's action in purporting to issue a call for redemption. The petitioner is not seeking payment of his interest in gold coin, but is merely seeking to hold his *bond until maturity*, or redemption in gold, whichever occurs first, and collect interest in currency in the interim.

While the present suit only involves one $10,000 First Liberty Loan Bond, the issue presented is very *much* the same as that presented in a total of more than eight and one-half billion dollars of bonds called by the Government since the repudiation of its obligation to pay gold, as found by Judge Littleton in his Finding of Facts in the Dixie Terminal case (October Term, 1937, No. 43). Since the decision of the United States Supreme Court that the Government's obligation to pay its

bonds in gold is a binding obligation, the Government has called every gold-clause bond which could be called, and has attempted to pay it in currency. The list includes:

Fourth Liberty Loan Bonds called for April 15, 1934	$1,875,000,000
Fourth Liberty Loan Bonds called for October 15, 1934	1,250,000,000
Fourth Liberty Loan Bonds called for April 15, 1935	1,870,000,000
Fourth Liberty Loan Bonds called for October 15, 1935	1,250,000,000
First Liberty Loan Bonds called for June 15, 1935	1,929,915,000
2% Consols of 1930 called for July 1, 1935	599,724,000
2% Panama Canal Bonds called for Aug. 1, 1935	74,901,000
Total	$8,849,540,000

Most of these bonds have already been redeemed or exchanged for bonds bearing a lower rate of interest, and there is now no remedy for the former holders, but those owners, like the plaintiff, who still hold their bonds should be able to draw interest at the 3½ per cent rate until maturity.

The question presented is whether the Government of the United States, after the Supreme Court of the United States has held that its obligation to pay its bonds in gold coin is a valid and binding obligation, however defective the remedy may be, can deliberately exercise the privilege given to it of calling its bonds in order that it may pay them in currency instead of in gold coin. It is the contention of the petitioner that interest on First Liberty Loan Bonds did not cease on June 15, 1935, for the following reasons:

1. THE PROVISIONS OF THE BOND AND CIRCULAR WITH RESPECT TO PAYMENT IN GOLD COIN ARE VALID UNDER THE PERRY DECISION, IN SPITE OF THE LEGISLATION ADOPTED BY CONGRESS.

2. THE ATTEMPT TO REDEEM WAS VOID AB INITIO, BECAUSE THE NOTICE PUBLISHED WAS NOT A NOTICE OF INTENTION TO REDEEM IN GOLD IN ACCORDANCE WITH THE TERMS OF THE BOND.

3. EVEN IF THE PURPORTED CALL WERE CONSIDERED VALID, THE RUNNING OF INTEREST ON PETITIONER'S BOND DID NOT

CEASE ON JUNE 15, 1935, BECAUSE THE UNITED STATES WAS NOT READY AND WILLING AT THAT TIME, OR AT ANY TIME, TO REDEEM THE PETITIONER'S BOND IN ACCORDANCE WITH ITS TERMS.

4. THE PURPORTED CALL ISSUED ON MARCH 14, 1935, WAS VOID, BECAUSE THE SECRETARY OF THE TREASURY HAD NO AUTHORITY TO ISSUE A CALL WITHOUT FURTHER ACTION BY CONGRESS.

5. THE PURPORTED CALL ISSUED ON MARCH 14, 1935, WAS VOID, BECAUSE FORBIDDEN BY SECTION 731 OF TITLE 31 OF THE UNITED STATES CODE (ACT OF MARCH 18, 1869, 16, STAT. 1).

1. THE PROVISIONS OF THE BOND AND CIRCULAR WITH RESPECT TO PAYMENT IN GOLD COIN ARE VALID UNDER THE PERRY DECISION, IN SPITE OF THE LEGISLATION ADOPTED BY CONGRESS.

In the case of *John M. Perry v. United States*, 294 U. S. 330, the plaintiff brought suit as the owner of a registered Fourth Liberty Loan 4¼% Bond, similar to that sued on in this case.

The Court of Claims certified to the Supreme Court of the United States the question whether the claimant was entitled to receive from the United States an amount in legal-tender currency in excess of the face amount of the bond. The Government contended that in view of the Joint Resolution of June 5, 1933, which purported to nullify all provisions for payment in gold, the Government could discharge the obligation by the payment of currency. The Supreme Court of the United States held that the Joint Resolution of June 5, 1933, insofar as it attempted to override the obligation created by the Fourth Liberty Loan Bond sued upon, went beyond the congressional power. Chief Justice Hughes, delivering the opinion of the Court, said:

> "In attempted justification of the Joint Resolution in relation to the outstanding bonds of the United States, the Government argues that 'earlier Congresses could not vadidly restrict the 73rd Congress from exercising its constitutional powers to regulate the value of money, borrow money, or regulate foreign and interstate com-

merce'; and, from this premise, the Government seems to deduce the proposition that when, with adequate authority, the Government borrows money and pledges the credit of the United States, it is free to ignore that pledge and alter the terms of its obligations in case a later Congress finds their fulfillment inconvenient. The Government's contention thus raises a question of far greater importance than the particular claim of the plaintiff. On that reasoning, if the terms of the Government's bond as to the standard of payment can be repudiated, it inevitably follows that the obligation as to the amount to be paid may also be repudiated. The contention necessarily imports that the Congress can disregard the obligations of the Government at its discretion and that, when the Government borrows money, the credit of the United States is an illusory pledge.

We do not so read the Constitution. There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers. In authorizing the Congress to borrow money, the Constitution empowers the Congress to fix the amount to be borrowed and the terms of payment. By virtue of the power to borrow money 'on the credit of the United States,' the Congress is authorized to pledge that credit as an assurance of payment as stipulated,—as the highest assurance the Government can give, its plighted faith. To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government.

* * * * * * *

The argument in favor of the Joint Resolution, as applied to Government bonds, is in substance that the Government cannot by contract restrict the exercise of a sovereign power. But the right to make binding obligations is a competence attaching to sovereignty.

* * * * * *

The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power vital to the Government,—

upon which in an extremity its very life may depend. The binding quality of the promise of the United States is of the essence of the credit which is so pledged. Having this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy those obligations. The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts. While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and, despite infirmities of procedure, remains binding upon the conscience of the sovereign."

In view of this decision, there can be no doubt that the Government was obligated to pay the petitioner's bond in gold coin of the former standard of value, and that this obligation remains binding upon the conscience of the sovereign.

The Lack of Remedy is not Material, Because the Plaintiff is not Suing for Gold. The plaintiff in the Perry case failed to recover because he attempted to obtain arbitrarily an amount of currency in excess of the face amount of his bond, without alleging or proving any direct damages to himself resulting from the Government's repudiation of its obligation. But in this case the plaintiff is not seeking a remedy; it is the Government which is attempting to exercise a privilege given to it by the terms of the bond, at the same time that it is repudiating its obligation contained in that bond. The petitioner contends that he may hold his bond until maturity, at which time the gold standard may be restored, or the value of the gold dollar increased. If not, the petitioner will no doubt be obliged to accept currency in payment of the bond. Although the Government is legally and morally obligated to pay this bond in gold, it is now trying to exercise the power given to it in the bond to redeem the bond, and to pay that bond immediately in a depreciated currency. If the Government had to pay the bond in gold, it would never have called the bond. The plaintiff is seeking to recover only the currency value of his coupon; he is not seeking damages for failure to pay gold; he is merely insisting that the Government cannot repudiate its obligations in one breath, and avail itself of privileges conferred on it at the same time.

2. THE ATTEMPT TO REDEEM WAS VOID AB INITIO, BECAUSE THE NOTICE PUBLISHED WAS NOT A NOTICE OF INTENTION TO REDEEM IN GOLD IN ACCORDANCE WITH THE TERMS OF THE BOND.

The First Liberty Loan Bonds provide:

> "All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, or on any semi-annual interest date or dates, at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date, and published thereafter from time to time during the said three months' period as the Secretary of the Treasury shall direct."

It is clear that "notice published at least three months prior to the redemption date" is a condition precedent to the right to redeem. What kind of a notice does this refer to? It must obviously be a notice to pay the bond in accordance with its terms. A notice to pay the bond in real estate, or by transferring municipal bonds or other securities, would be exactly as good as no notice at all. Under the circumstances existing on March 14, 1932, and the legislation then in effect, this notice was not a notice to redeem in gold in accordance with the terms of the bond, but a notice to redeem in currency.

On March 14, 1935, when the notice to redeem First Liberty Loan Bonds was issued in Treasury Department Circular No. 535, there was in full effect the Gold Reserve Act of 1934, which provided: "No gold shall hereafter be coined and no gold coin shall hereafter be paid out or delivered by the United States." We respectfully submit, in the first place, that the Secretary of the Treasury, while that statute was in effect, could not issue a notice of intention to pay the bond in accordance with its terms. The Secretary of the Treasury is an administrative officer, subject in all respects to the legislation of Congress. Except for enactment by Congress, the right to redeem "at the pleasure of the United States" does not mean the right to redeem at the pleasure of the Secretary of the Treasury. As far as he has any power to issue a notice, it exists by congressional enactment. Since Congress prohibited him from paying out gold, there can certainly be no authority

implied in any way for him to give a notice of intention to redeem in gold.

In the second place, no matter what the power of the Secretary of the Treasury, the notice issued was not a notice to redeem in gold. It was silent as to the medium of payment, but in view of the legislation then in effect, it was clearly a statement of intention to redeem in currency and not in gold. We have already referred to the *Joint Resolution of June* 5, 1933, and the Gold Reserve Act of 1934. We have referred to the various other acts of Congress and the President nationalizing gold and prohibiting the holding of gold by private persons. The notice issued must be construed in the light of these enactments as a notice to redeem in currency. It must be presumed that the Secretary of the Treasury, an administrative officer, was merely carrying out the intention of Congress.

This is no imaginary argument. When the call was issued, everybody in the United States knew exactly what was intended. Congress had repeatedly declared its intention of abandoning gold and paying in currency. No official of the Government, no holder of any bond, had the slightest idea that the notice of call meant anything except a call to pay in currency. The Secretary of the Treasury would never have called the bonds if he had had the slightest expectation of having to pay in gold.

The President had also devalued the dollar, and established, with the approval of Congress, a dollar having a different standard of value from that prescribed in the bond, so that even if gold could have been paid out, it would have been a different amount of gold than that called for by the terms of the bond.

A call for payment in currency is clearly not in accord with the provisions of the bond and the circular under which the bond was issued, which provisions this Court has held to be valid. It seems manifest, therefore, that the so-called "call" of March 14, 1935, may be treated by the bondholder as completely void, and his bond will continue to draw interest until maturity, or until after a bona fide call for redemption in accordance with the terms of the bond.

In its attempt to support its position, the defendant is forced to fall back on the claim that the intent of the United States in its character as sovereign to pay the bonds in currency must be completely severed from its intent as contractor to pay the bonds in gold. The Government in the lower court relied on cases which hold that interference with the performance of contracts between the Government and private persons, arising from acts of the Government *in its* capacity as sovereign, does not result in claims for damages against the Government. The holding of these cases is very different from the present claim that the Government may do an act, or issue a call, and claim that it means one thing in its capacity as contractor and an entirely opposite thing in its capacity as sovereign. The position of the Government seems to be that it can say, "In my capacity as contractor, I now call these bonds for payment in gold and intend to pay for them in gold; but in my capacity as sovereign, I prohibit myself from paying gold and intend to pay the bonds in currency." Such a distinction cannot be made. The call was either a call for payment in gold or it was *not* a call for payment in gold, and we submit that with the laws then in effect it could not be and was not a call for payment in gold.

The whole argument that the Government can distinguish itself as contractor and sovereign in the matter of Government Bonds was destroyed once and for all in the Perry case. The Government's contention in that case was that in its capacity as sovereign it could effectually destroy its obligation as contractor on its own bonds. It was a strong argument, which prevailed with one of the Justices of this Court, and it drew support from the very cases which the Government attempts to rely on here. But the Court found that the Government's own obligations on its public debt were assumed in the exercise of its sovereign powers, and that they could not be changed or abrogated through the exercise of any other sovereign power.

It is suggested by the Government that because the Supreme Court of the United States, in Perry v. The United States, treated the call as valid, and considered Perry's claim for pay-

ment of the principal, therefore that case is an authority to establish the validity of the Government's call. In the first place, this question was not considered by this Court at any point. Both the Government and the plaintiff were willing to proceed on the assumption that the bond had been called, so that the point was not brought to the attention of the Court. In the second place, it is entirely possible that the bondholder may have an option to treat the call as valid if he so desires. If a private corporation issued a call, and then failed to have funds to pay the bonds, the bondholder certainly could hold his bonds until maturity, but he should also in reason have an option to treat the bonds as called and insist upon their payment. Such a corporation would be estopped to assert the invalidity of its own call.

The Government in the lower court contended that the tender to petitioner of currency in payment of his bond was a compliance with the terms of the bond, on the ground that currency is the "equivalent" of gold. To support this position, they quote from the opinion of the Chief Justice in *Perry v. The United States*, at page 357, in which he states that the word "equivalent" cannot mean more than the amount of money which the promised gold coin would be worth to the bondholder for the purpose for which it could legally be used. But in that case the plaintiff sued for $10,000 in gold coin, or its equivalent in currency, which the plaintiff claimed to be $16,931.25. The Chief Justice held that this was not necessarily the equivalent in currency, and that many other circumstances, such as the price level and the intrinsic worth of the currency, had a bearing on the question. The entire discussion related solely to the question of damages. In this case, however, the question of damages does not arise, nor is the petitioner asking for any "equivalent." It is the Government which is tendering the petitioner something, in redemption of his bond prior to maturity, which the Government is claiming to be the "equivalent" of gold.

Certainly currency is not the same as gold coin. This Court necessarily holds that it is different in holding the Joint Resolution of June 5, 1933, unconstitutional. That Resolution provided:

> "Every obligation heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

The very thing which Congress was attempting to do was to make legal-tender currency the equivalent of gold coin. When this Court stated that "the Joint Resolution of June 5, 1933, insofar as it attempted to override the obligation created by the bond in suit, went beyond the congressional power," it necessarily held that legal-tender currency was not the equivalent of gold coin.

The right of redemption is based on exact compliance with the terms of the bond. Petitioner is not obligated to allow his bond to be redeemed, even though the Government does offer an equivalent or far more than an equivalent. The right of redemption rests on the words of the bond and the circular, which say nothing whatever about an "equivalent."

We respectfully submit, therefore, that the entire procedure by which the Government attempted to call Liberty Bonds in advance of maturity, when it had no intention to pay the bonds in accordance with their terms and statutes expressly forbade such payment, was void *ab initio*, because the notice published was not the notice provided for by the bond. It follows, therefore, that interest did not cease to run on the date fixed for redemption, but continued as part of the original contract entered into by the Government in its bond.

Our position is supported by the decision of the Circuit Court of Appeals for the Fourth Circuit, in the case of *Machen v. United States of America*, 87 Fed. (2d) 594, p. 597. Judge Parker said:

> "It would hardly be contended that a notice to the effect that the Government would redeem the bonds at fifty-nine cents on the dollar would be a sufficient notice under the bond to stop the running of interest and avoid the subsequently maturing coupons; but it will be seen that this is precisely what the notice as published means when the acts of Congress and the presidential proclamation affecting the currency are read into it, and when it is remembered that Congress is without power to abrogate

the gold clause as contained in obligations of the Government. * * *

"It follows that because of the legislation and the presidential proclamation to which we have referred, the Secretary of the Treasury was without power, both at the time of the publication of the notice and at the time fixed for redemption, either to pay gold on the gold clause bonds or to pay in paper money the value of the gold *which they promised. He was consequently without power under the laws to redeem these gold clause bonds* at their face value; and the notice of redemption which *he issued must be construed in the* light of this lack of power."

3. EVEN IF THE PURPORTED CALL WERE CONSIDERED VALID, THE RUNNING OF INTEREST ON PETITIONER'S BOND DID NOT CEASE ON JUNE 15, 1935, BECAUSE THE UNITED STATES WAS NOT READY AND WILLING AT THAT TIME OR AT ANY TIME TO REDEEM THE *PETITIONER'S* BOND IN ACCORDANCE WITH ITS TERMS.

The defendant stresses the language of the petitioner's bond reading as follows: "From the date of redemption designated in any such notice, interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void." Under Section 2 of this argument, we have pointed out that this clause does not apply because the notice actually given was not the notice contemplated by the bond; but we now submit further that even if such a notice had been given, interest would not cease if the Government never contemplated the redemption of the bond in accordance with its terms or made any provision for such redemption. The clause must be interpreted in the light of other covenants of the bond, of the coupon, of the understanding of the parties, and of the contract as a whole.

Surely the clause quoted does not mean that interest shall cease on the mere issue of a call, though made expressly in gold coin, if there were no intention or ability to redeem the bonds on the call date. Analyzing the situation in the case of called bonds, it would appear that interest ceases (1) if proper notice of redemption is given, and (2) if the obligor is pre-

pared to pay the bond in accordance with its terms on the date set. If a corporation calls bonds, and then fails to have the money on hand to redeem the bonds in accordance with the call, the holder of such bonds surely has the option of retaining his bonds until maturity and collecting interest. It is possible that he also has the option of availing himself of the terms of the call and suing for immediate payment on the ground that the debtor has estopped itself from denying the validity of the call.

The necessary and logical conclusion from the Government's position is that under the terms of the bond the Government could call a bond without the slightest intention of paying it and thereby cause interest to stop running. In the *Perry* case, this Court insisted on the sacredness of the Government's obligations. The construction of the obligation insisted on by the Government would enable it to cancel its sacred obligations.

In the case of *Sterling v. H. F. Watson Company*, 241 Pa. 105, 88 Atl. 297 (1913), the defendant attempted to call its preferred stock by the payment of its par value and accrued dividends, which it was entitled to do, but attempted to deduct from the accrued dividends the par value of a twenty-five per cent stock dividend which had been distributed eight years before. The stockholder sued to restrain the company from stopping dividends after the call date, and from refusing to transfer the stockholder's stock. The Supreme Court of Pennsylvania held that the twenty-five per cent stock dividend could not be considered under the terms of the preferred stock redemption clause, and granted the stockholder's petition, requiring the company to treat the plaintiff as a stockholder by transferring his stock, and to continue the payment of semi-annual dividends until a call was issued strictly in accordance with the terms of the redemption clause.

In *Corbett, Executrix, v. McClintic-Marshall Corporation*, 17 Delaware Chancery 165 (1930), the directors of the company exercised their charter right to redeem complainant's preferred stock, but complainant contended that the price at which they proposed to redeem was not the correct price. On demurrer, the Chancellor held that the petition stated

a proper cause of action, but that the complainant was not entitled to insist on cash redemption at the higher price which she claimed, because this was within the discretion of the board of directors, a discretion which they had not exercised. The court held, however, that she was entitled, if she proved her case, to retain the status of a preferred stockholder. The court said, on page 171:

> "In view of the fact that the bill shows that the defendant has notified the complainant in substance that she is to be denied the status of a preferred stockholder in the future, the nature of the case, if the complainant be right in her claims touching the alleged illegality of the proposed redemption, requires a decree that though she cannot on the facts alleged enforce a redemption in accordance with her specific prayers, yet the defendant is bound to treat her as a preferred stockholder until proper redemption of her stock has been effected."

It is well settled that holders of bonds without a call provision cannot be made to accept payment in advance of maturity: *Chicago, etc. Railroad Co. v. Pyne*, 30 Fed. 86; *Missouri Railroad Co. v. Union Trust Co.*, 156 N. Y. 592. 51 N. E. 309. A statute providing that payment must be accepted before maturity is unconstitutional; *Randolph v. Middleton*, 26 N. J. Equity 543. Surely an effective call cannot be issued unless it is followed by a tender of the money either to a trustee or paying agent in the case of a private corporation, or direct to the bondholder in the case of the United States. As the Court of Appeals of New York said, in the case of *Missouri Railroad Co. v. Union Trust Company*, supra:

> "They (the bondholders) have the right to have their bonds redeemed only according to the contract, and unless they are so redeemed, to hold them and draw interest upon them until the day of payment shall arrive."

We respectfully call the court's attention to the English case of *Gordillo v. Weguelin*, 5 Chancery Division 287 (1877), in which the question of cessation of interest was discussed. In that case a mortgage indenture provided that the debtor would pay interest and five per cent of the principal sum semi-annually. Provision was made that a certain amount of bonds should be drawn for redemption on May first and November

first of each year, to be redeemable on the following June first and December first, respectively. The indenture then provided: "but no interest shall be payable on any drawn bond after the date fixed for its redemption." The debtor having defaulted, the trustees took possession after certain bonds had been drawn and called, but before they had been redeemed. The question arose whether the holders of bonds drawn for redemption, but whose bonds the trustee was unable to pay, were entitled equally with holders of undrawn bonds to receive interest. The court held, despite the words quoted above, that interest continued to accrue on the drawn bonds, because they had *not* been paid on the date fixed for redemption, and that such interest had the same status under the terms of a deed of trust as interest on the undrawn bonds. Lord Justice James said:

> "I am of opinion that upon the whole deed what was intended was that interest should run until the bond was paid, or until it was payable according to the terms of the deed, that is *de facto* payable out of funds provided for that purpose. When the bonds were in truth payable, not payable in the sense of the money being recoverable in an action at law, or anything of that kind, but payable by reason of the fund being provided for the purpose of paying them, either in the hands of the contractors or received by the trustees, then the interest would cease, and until it was so payable in truth and in fact, as well as in legal right of action, the interest runs."

While the petitioner's bond provided that from the date of redemption designated in any notice of call, interest on the called bonds should cease, yet the bond also contained the express provision that "all or any of the bonds of the series of which this is one, may be redeemed *and paid* (italics ours) * * * ." Certainly this provision for redemption and payment would not have been inserted in the bond, if it were the intention of the parties that interest should cease upon a date set for redemption, regardless of the willingness and ability of the United States to redeem.

The Government relies on the phrase used in the first sentence of the bond, in which the United States promises to pay the principal sum "with interest at the rate of three and one-half percentum per annum payable semi-annually on Decem-

ber fifteenth and June fifteenth in each year until the principal hereof shall be payable." The Government points out that the Government does not undertake to pay interest until the principal shall be "paid." Of course it is clear why the word "payable" is used. Many holders of such bonds do not turn in their bonds on the call date, through oversight or otherwise, and it is proper that interest should cease to run at that time in the ordinary case when the Government is meeting its obligations. In order to provide for this contingency, the word "payable" is used.

If it had been thought necessary to provide for the contingency that the Government would repudiate its bonds, only a very complicated phrase could have expressed the Government's obligation. It would have had to refer to a repudiation, which nobody thought likely or desired to refer to. Contracts seldom provide for what shall occur in case of default because they are made to be carried out and not to be broken. It is usual to leave to the courts the question of the parties' rights when such a default does occur. This is particularly true in the case of the Government, for, as stated by Mr. Justice Strong in *United States v. Sherman*, 98 U.S. 565: "But delay or default cannot be attributed to the Government. It is presumed to be always ready to pay what it owes."

Furthermore, the word "payable" refers to the maturity of the bond, and not to any date on which it may be redeemable. We direct the attention of this Court to its entire opinion in the case of *Morgan v. United States*, 113 U.S. 476. This Court quoted from several of its earlier decisions, in which a distinction was made between the words "redeemable" and "payable," and in which it was pointed out that bonds do not become payable until the maturity date, although they may under their terms be redeemable prior to such date. We submit that the wording of the bond that it shall bear interest until the principal becomes payable is a stock phrase employed by generations of bond draftsmen, meaning simply that the bond will bear interest until maturity. When the word "payable" is considered in the light of its true meaning, as set forth in the Morgan case, as simply the maturity date of the bond, it is readily seen that the cases of *Sterling v. Watson Co.*,

supra, and *Corbett, Executrix, v. McClintic-Marshall Corporation*, 17 Del. Chancery 165, distinguished by the Court of Claims in its opinion, are applicable to the instant case. Furthermore, the case of *Spaulding v. Lord*, 19 Wis. 533, relied upon by the Court of Claims, has no application to the present case, for in that case the meaning of the word "payable" was the maturity date of a five-year improvement fund certificate. In that case there was no right reserved to redeem the certificate prior to maturity, nor was any attempt made. The only question presented to the court was whether or not, after maturity, the bond bore interest at the rate designated in the certificate or at the statutory rate.

We respectfully submit, therefore, that if the contract is construed in accord with the intention of the parties, interest would not cease on June 15, 1935, even though the call had been expressly a call for payment in gold coin. This is the view expressed in a note in 50 Harvard Law Review 986. If there is any ambiguity, the bond should be construed most strongly against the Government because drafted by its own officials, and sold to persons who did not even contemplate the repudiation of its obligations by the United States. Certainly this Court should not countenance an interpretation of the bond which necessarily means that the Government may at any time call a bond without the slightest intention of paying it, and thereby stop the running of interest after the call date, whether or not the Government is prepared to redeem the bond on that date. This is not the contract which the bondholders thought they were getting.

4. THE PURPORTED CALL ISSUED ON MARCH 14, 1935, WAS VOID, BECAUSE THE SECRETARY OF THE TREASURY HAD NO AUTHORITY TO ISSUE A CALL WITHOUT FURTHER ACTION BY CONGRESS.

As pointed out on page 10, the First Liberty Loan Act authorized the Secretary of the Treasury to prescribe the terms of redemption of bonds issued under such act. Under such broad authority, the Secretary of the Treasury might have prescribed any one of several methods for issuing a notice of call. He actually did prescribe that the First Liberty Loan Bonds should be redeemable at the pleasure of the United

States. In the case of *Morgan v. United States*, 113 U. S. 476, Mr. Justice Matthews, writing the opinion for this Court, referred to the provision as to calling bonds there involved, and stated:

> "The pleasure of the Government to redeem them or any part of them, of course, could only be declared by law. Provision to this effect was made by the Act of July 14, 1870."

We respectfully submit that the conclusion of this Court in that case was correct. There is no more reason why the pleasure of the Secretary of the Treasury should be the pleasure of the United States than the pleasure of the President, or of the Vice-President, or any other officer of the Government. The redemption of bonds is a major financial transaction, requiring the consideration of Congress. The Secretary of the Treasury, between October 12, 1933, and August 1, 1935, determined to call nearly nine billion dollars in bonds payable in gold, at a time when the terms of the bonds could not be complied with. The policy followed involved a repudiation by the Government of its solemn obligations declared to be such by this Court in the case of *Perry v. United States*, 294 U. S. 330. Certainly no one would maintain that an individual, holding an appointed office in a government founded on the theory of popular representation and control, would have the right to obligate the country for nine billion dollars. We submit that he has no greater right to exercise the pleasure of the United States in repudiating obligations incurred on the authorization of Congress.

5. THE PURPORTED CALL ISSUED ON MARCH 14, 1935, WAS VOID BECAUSE FORBIDDEN BY SECTION 731 OF TITLE 31 OF THE UNITED STATES CODE (ACT OF MARCH 18, 1869, 16 STAT. 1).

This Section 731 provides:

> "None of the interest-bearing obligations not already due shall be redeemed or paid before maturity, unless at such time United States notes are convertible into coin

at the option of the holder, or unless at such time bonds of the United States bearing a lower rate of interest than the bonds to be redeemed can be sold at par in coin."

The reason for the original passage of this law was obviously to prevent the Government from doing just what it is attempting to do now—paying off its obligations to its bondholders in a depreciated currency. United States notes, or "greenbacks," were, of course, at a considerable discount from gold in 1869, and were not redeemable in gold or silver coin at that time. In order to protect the bondholders, Congress provided that none of the interest-bearing obligations should be redeemed or paid before maturity as long as United States notes were not convertible into coin at the option of the holder. Neither on March 4, 1933, nor at any subsequent date have United States notes been convertible into coin at the option of the holder. The Government, and not the holder, has the option, and it may pay out currency of any kind for any United States notes presented.

The proviso at the end of Section 731 was intended to permit the redemption of bonds if the Government is in a position to sell its bonds and receive gold for them, even though they bear a lower rate of interest. If the bonds bearing a lower rate of interest can only be sold for currency, then no call can be made. It is obvious that Government Bonds, when this call was issued in 1935, could not be sold for gold coin. There was no gold coi except in mirror hoards, and if anyone could lawfully have obtained gold, he would not have paid gold for United States Bonds, whether on their face they were payable in gold in currency.

It is suggested that United States Bonds might have been sold for silver coin. Obviously the Government has never sold bonds and required payment in silver coin, and it is not a practical operation. An examination of the testimony and schedule presented by the Treasury (R. 18) shows that the total amount of silver coin in existence in 1935 was approximately eight hundred fifty-nine million dollars, considerably less than the amount of the First Liberty Loan Bonds called. Furthermore, all of the bullion and nearly all of the standard silver dollars were in the Treasury already, and of course the

subsidiary silver coin not in the Treasury, amounting to about $300,000,000, is required for ordinary change throughout the country. Furthermore, the silver coin has a purely fictitious value in excess of the value of the silver contained in such coins, and in effect is nothing but subsidiary currency. In 1869 it might have been possible for the Government to sell gold bonds and require payment in gold coin, thus obtaining the gold coin necessary to redeem the prior issue, but since the validity of the gold clause is in doubt, such bonds cannot be sold either for gold or silver coin today. In short Section 731 was intended to prevent exactly what the Government is now trying to do.

CONCLUSION

We respectfully submit that interest did not cease on June 15, 1935, on First Liberty Loan Bonds, because for the various reasons stated in sections 2, 4 and 5 of our argument, no valid call was ever issued for the redemption of such bonds, and because, as we have shown under section 3 of our argument, even if such a call were issued, the unwillingness and inability of the Government to redeem the bonds in accordance with their terms would demand a continuance of interest until maturity. The decision of the Court of Claims denies "the validity of the public debt of the United States, authorized by law" in violation of the Constitution of the United States.

Respectfully submitted,

ROBERT A. TAFT,
Attorney for Petitioner.

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 43

THE DIXIE TERMINAL COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MAY 7, 1937

CERTIORARI GRANTED JUNE 1, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 961

THE DIXIE TERMINAL COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 10, 1937.

[fol. 1]

IN UNITED STATES COURT OF CLAIMS

No. 42948

THE DIXIE TERMINAL COMPANY, Plaintiff,

vs.

THE UNITED STATES, Defendant

I. PETITION—Filed March 11, 1935

1. Plaintiff is a corporation organized and existing under the laws of the State of Ohio, and is the owner, holder for value and bearer of an obligation of the United States of America, in principal amount of Fifty Dollars ($50.00), known as Fourth Liberty Loan 4¼% Gold Bond of 1933-1938, Serial Number A00055321, a copy of which is annexed hereto and made a part hereof, marked "Schedule A." Said bond is one of a series of 4¼% Gold Bonds of 1933-[fol. 2] 1938, authorized by an Act of Congress approved September 24, 1917, as amended, and issued pursuant to Treasury Department Circular No. 121, dated September 28, 1918, a copy of relevant provisions of which is annexed hereto and made a part hereof, marked "Schedule B." By the terms of said bond, the defendant promised to pay to bearer on October 15, 1938, the principal sum of Fifty Dollars in United States gold coin of the standard value on the date of issuance, October 24, 1918, and to pay interest on said principal sum in like gold coin at the rate of four and one-quarter per cent (4¼%) per annum from the date of the bond, on April fifteenth and October fifteenth in each year, until the principal should be payable, upon presentation and surrender of the interest coupons as they severally mature.

2. Plaintiff is the owner, holder for value and bearer of an interest coupon formerly attached to said bond, a copy of which is attached hereto and made a part hereof, marked "Schedule C," by the terms of which defendant promised to pay to bearer on October 15, 1934, the sum of One Dollar and Seven Cents ($1.07) in United States gold coin of the standard of value on the date of issuance, being six months' interest due October 15, 1934, on the bond hereinbefore referred to.